SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 153

HARTLEY CALDWELL,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

BRIEF IN SUPPORT OF PETITION.

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1. The Opinions and Decisions of the Courts Below.

The opinion of the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles was filed March 1, 1940, and appears in the Transcript of the Record at (R. 6-11). It has not been reported. The decree of the Superior Court filed and entered March 1, 1940, appears in the Transcript of the Record at (R. 11). The order denying a timely petition for rehearing without opinion was entered March 18, 1940, and appears in the Transcript of the Record at (R. 12).

2. Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by Act of February

13, 1925. This petition is filed in accordance with Rule 38 of this Court.

3. Statutes Involved.

The pertinent sections of the Insurance Code of the State of California are as follows (Chapter 145 Statutes of 1935, California, as amended):

> "Section 700. A person shall not transact any class of insurance business in this State without first being admitted for such class. Such admission is secured by procuring a certificate of authority from the Commissioner. Such certificate shall not be granted until the applicant conforms to the laws of this State prerequisite to its issue * * *."

> "Section 703. Except when performed by a surplus line broker, the following acts are misdemeanors when done in this State:

> *a.* Acting as agent for a non-admitted insurer in transaction of insurance business in this State.

> *b.* In any manner advertising a non-admitted insurer in this State.

> *c.* In any other manner aiding a non-admitted insurer to transact insurance business in this State.

> In addition to the penalty provided for commission of misdemeanors a person violating any provision of this section shall forfeit to this State the sum of Five Hundred Dollars, together with One Hundred Dollars for each month or fraction thereof during which he continues such violation."

> "Section 1760. Any citizen of this State may negotiate and effect insurance on his own property with any non-admitted insurer."

> "Section 1760.5. The provisions of this chapter limiting the insurance which may be placed with nonadmitted insurers and requiring any report thereof shall not apply to:

(a) Reinsurance of the liability of an admitted insurer.

(b) Insurance against perils of navigation, transit or transportation upon hulls, freights or disbursements, or other shipowner interests; * * * (usual navigation definition).

(c) Aircraft insurance.

(d) Insurance on property or operations of railroads engaged in interstate commerce.

The insurances specified in the foregoing paragraphs (b), (c), and (d), may be placed with a non-admitted insurer only by and through a special lines' surplus line broker. The license of a special lines' surplus line broker shall be applied for and procured and shall be subject to the same fees for filing on issuance in the same manner as the license of a surplus line broker, except that in lieu of the bond required by subdivision (b) of section 1765, there shall be delivered to the commissioner a bond in the form, amounts, and conditions specified in section 1644 of this code and only one fee shall be collected from one person for both licenses. * * *

The premium for insurance placed by or through a special lines' surplus line broker pursuant to this section shall not be subject to the tax imposed upon such broker based upon gross premiums paid for insurance placed under authority conferred by his license."

"Section 1761. Except as provided in Sections 1760 and 1760.5 a person within this State shall not transact any insurance on property located or operations conducted within, or on the lives or persons of residents of this State with non-admitted insurers, except by and through a surplus line broker licensed under this chapter and upon the terms and conditions prescribed in this chapter."

"Sections 1763 to 1779 inclusive provide the method of effecting insurance with non-admitted insurers through surplus line brokers."

"Section 25. 'NON-ADMITTED' in relation to a person means not entitled to transact insurance business in this State, whether by reason of failure to comply with conditions precedent, or by reason of inability so to comply."

"Section 35. 'TRANSACT' as applied to insurance includes any of the following:

a. Solicitation.

b. Negotiations preliminary to execution.

c. Execution of a contract of insurance.

d. Transaction of matters subsequent to execution of the contract and arising out of it."

"Section 39. If any provision of this code, or the application thereof to any person or circumstance, is held invalid, the remainder of the code, or the application of such provision to other persons or circumstances shall not be affected thereby."

"Section 103. 'MARINE INSURANCE' includes insurance against any and all kinds of loss or damage to:

a. Vessels, etc. (Usual definition of navigation insurance) * * *

b. * * *

c. Precious stones, jewels, jewelry, gold, silver and other precious metals whether used in business or trade or otherwise and whether the same be in course of transportation or otherwise."

The pertinent portion of Section 596, Political Code, here involved is Section 596, Political Code:

"* * * no person, firm or corporation within this State shall solicit, negotiate or effect any insurance * * * *Marine Insurance* and insurance upon the property of steam railroads and other common carriers engaged in interstate trade *excepted* * * *

with companies not authorized to transact business in this State, except by and through a surplus line broker * * *."

4. Statement of the Case.

On March 24th, 1939, a complaint was filed in the City Court of the City of Beverly Hills, California (R. 14) charging petitioner with the crime of acting as agent without a license for a non-admitted insurer. There was no trial on any issue of fact, petitioner admitting the act in a written stipulation of facts (R. 2), which, together with the photostatic copy of the policy of Marine Insurance effected, was the basis upon which the case was submitted, petitioner contending that the act was permitted by law, and, therefore, no public offense was committed or that his conviction would deprive him of liberty without due process of law secured to petitioner under the 14th Amendment of the United States Constitution (R. 13). On May 23rd, 1939, petitioner was convicted, a Motion for New Trial was denied and he was duly sentenced (R. 16-17). An appeal was taken in due course to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles (herein the Superior Court) and on October 30th, 1939, said Superior Court affirmed the judgment as to Count 1 and reversed the judgment as to Count 2. A rehearing was granted and on March 1st, 1940, said Superior Court, *in a divided opinion,* affirmed conviction as to Count 1 and unanimously reversed Count 2 (R. 6-11). A timely petition for rehearing was denied on March 18th, 1940, and remittitur issued (R. 11). Petitioner then attacked the jurisdiction of the City court and the Superior Court by petition for Writ of Review in the District Court of Appeal, on April 3rd, 1940, which petition was denied April 4, 1940. A timely petition for hearing and a Writ of Review to the Supreme Court of the State of California was

denied without opinion June 3rd, 1940. (Note that under Section 1068 Code of Civil Procedure, the issuance of a Writ of Review to an inferior court is discretionary and cannot issue unless the inferior court was w i t h o u t jurisdiction).

5. Specification of Errors.

1. Your petitioner respectfully assigns as error the decision of the Appellate Department of the Superior Court of the State of California affirming petitioner's conviction:

a. For non-compliance with license laws which do not provide a method for obtaining the license, thereby denying petitioner due process of law secured to petitioner under the 14th Amendment to the Constitution of the United States.

b. Under Penal Statutes which are so vague and uncertain that a person of ordinary intelligence cannot determine a standard of conduct therefrom, thereby denying petitioner due process of law secured to petitioner under the 14th Amendment to the Constitution of the United States.

2. Your petitioner further respectfully assigns as error the decision of the Appellate Department of the Superior Court of the State of California affirming his conviction for violation of Statutes which as construed by said Court are vague and uncertain and, therefore, repugnant to the 14th Amendment of the United States Constitution which provides that no person shall be denied of life, liberty or property without due process of law.

6. THE ARGUMENT.

Point I.

A criminal statute as applied in this case penalizing non-compliance with license laws which do not provide a method for obtaining the license, is repugnant to the 14th Amendment to the Constitution of the United States which provides that no person shall be deprived of life, liberty or property without due process of law.

a. Petitioner acted as agent for Lloyd's, an insurer which is neither a corporation nor a co-partnership, but individuals operating under a unique plan favorably serving the insuring public for more than two hundred years (R. 2).

b. Petitioner did not advertise (R. 2), nor otherwise aid the insurer (R. 2), but was solicited by the assured to secure a policy of Marine Insurance upon his own property (R. 2).

There is no provision in the insurance laws of California setting forth conditions under which Lloyd's may secure a license.

INSURANCE CODE OF CALIFORNIA.

c. In exercising control of businesses affected with Public Interest, the control so exercised must be in conformity with *Constitutional provision.*

Couch Encyclopedia of Insurance, Vol. #1, pp. 506 and 507.

d. Petitioner concedes that under the Police Power, the business of insurance may be regulated, but such regulation must conform to reasonableness and constitutional limitations.

Until a procedure by which the insurer may obtain a license to operate is established, petitioner as agent thereof

cannot be penalized for acting without a license, without depriving him of liberty without due process of law.

Commissioner v. *Reinoehl*, 163 Pa. 287, 25 L. R. A. 247;
Fort v. *Georgia*, 92 Ga. 8, 23 L. R. A. 86;
Couch on Insurance, Vol. I, PP. 506 and 507.

Point II.

The Insurance Laws of the State of California as contained in Sections 700, 703, 1760, 1760.5 and 1761 Insurance Code and Section 596 Political Code are so vague and uncertain that a person of ordinary intelligence cannot determine their meaning and the penal provisions thereof as applied in this case are repugnant to the 14th Amendment to the Constitution of the United States, providing that no person shall be deprived of liberty without due process of law.

Section 700, Insurance Code, purports to prohibit absolutely any transaction by a non-admitted insurer in California.

> "A person shall not transact any class of insurance business in this state without first being admitted for such class. * * *"

Section 703, under which petitioner was charged and convicted, purports to penalize violations of Section 700 while stating an exception thereto.

Section 1760 to Section 1779, inclusive, set forth in elaborate manner a method whereby non-admitted insurers may transact business in California, notwithstanding Section 700.

Presuming a person of ordinary intelligence reads these sections he finds in Section 1760.5 that he can advertise, solicit for and effect re-insurance of all kinds for and on behalf of a non-admitted insurer without restrictions and without being licensed in any manner.

Now reading Section 1760 he finds that if he has not advertised, nor solicited (in the instant case it was stipulated that petitioner did neither), and a citizen desires to negotiate and effect insurance upon his own property (R. 2), as a representative of a non-admitted insurer he may negotiate with the citizen and effect any kind of insurance for him.

But what of the prohibition of Section 700? Reading that section he finds that under no circumstances may a non-admitted insurer transact any kind of insurance in California. Should he be guided by Section 700, or one or all of the many apparent exceptions?

A person of ordinary intelligence would probably conclude that the legislature intended some meaning to the nineteen sections (1760-1779 inc.) setting up exceptions to Section 700, and proceed to govern himself accordingly. But he finds that although his interpretation based upon a fair reading of the statutes and upon practical custom and usage is reasonable, the courts interpret the statutes differently. He is charged with violating a criminal statute, convicted and upon appeal finds vagueness and uncertainty exaggerated for even the learned judges cannot agree upon the interpretation of those statutes. *Vide* the dissenting opinion in Appellate Superior Court (R. 11).

> "The opinion of my associates in effect necessarily presumes that the State of California through its Insurance Code assumes to regulate business outside such State of California. Under their interpretation, Section 1760 states an exception, *not* to regulations or prohibitions *within*, but only to those operative *without*, such States. In my opinion, the insurance code of California can and must be recognized as affecting business only within the State. To give reasonable effect to Section 1760, 1760.5 and 1761, we should construe those sections as affecting business transacted in California. Those sections qualify Section 703 just as they also

qualify Section 700. If a property owner is enabled to do business in California with a non-admitted insurer, there must be those in the State with whom he transacts that business. The judgment of conviction of Count 1 should also be reversed.

SCHAUER, Judge."

If the three judges of Appellate Superior Court cannot agree as to the meaning of the words used in the statutes, then petitioner submits the uncertainty of those laws is self-evident. Such uncertainty is even more bewildering to a person of ordinary lay intelligence who is required to interpret the law in order to determine a standard of conduct which will not subject him to criminal prosecution.

Such obvious uncertainty in a criminal law clearly brings it within the rule of *Connally* v. *General Construction*, 269 U. S. 385. At page 391 this Honorable Court states its rule thus:

> "A criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, lacks the first essential of due process of law."

Point III.

As construed by the Appellate Department of the Superior Court, Insurance Laws of the State of California, contained in Sections 700, 703, 1760, 1760.5 and 1761 Insurance Code, and Section 596 Political Code, are so vague and uncertain and lead to such absurd consequences that as so construed and applied in this case they deny to petitioner due process of law guaranteed under the 14th Amendment to the Constitution of the United States.

The Superior Court has construed the statutes involved in such a manner that not only petitioner, but also others similarly situated, are threatened with prohibition of useful

and necessary acts. By holding that Section 1760 Insurance Code, is not an exception to 703 because it is in a different chapter it necessarily holds that Section 1760.5 immediately following is not an exception to 703. Under the construction placed thereon by the Appellate Superior Court, Section 703 limits to a Surplus Line Broker the right to effect any insurance for a non-admitted insurer in California, but Section 1760.5 specifies that only a Special Lines' Surplus Line Broker may effect aircraft insurance, navigation insurance, or insurance for steam railroads, for non-admitted insurers. The consequence is that by reason of such construction, the State, after collecting a $50.00 fee and requiring a thousand dollar bond and licensing a Special Lines' Surplus Line Broker under Section 1760.5, prevents such licensee from doing the act and the only act for which he is licensed, under threat of a misdemeanor penalty.

The Superior Court, by its construction, holds that the only exception to Section 700 is the exception in 703, to-wit: a Surplus Line Broker. What then is the meaning of Sections 1761, 1760.5 and 1760, and how can a person of ordinary intelligence determine a standard of conduct therefrom in the light of the decision of the State court? This Honorable Court is bound by the construction placed upon the statutes by the highest court in the State, and if as a result of such construction they are vague and uncertain and lead to absurd consequences, then they result in a denial of due process of law.

National Cotton Oil Co. v. *Texas*, 197 U. S. 115 at p. 131.

Superior Court held that Section 596, Political Code, was repealed *in toto* by implication. Accepting that court's construction that Section 1760 does not operate as an exception to Section 703 and assuming that Section 1760.5 is an exception to 703, the resulting situation is that insurance for

steam railroads engaged in interstate trade may be placed with non-admitted insurers without a premium tax and through any source, while insurance upon other common carriers engaged in interstate trade must be placed through Surplus Line Brokers with a 3% tax, for only in Section 596, Political Code, is insurance for "Other Common Carriers" excepted from the requirements of 700 and 703.

Petitioner respectfully urges that the argument advanced under Point II, *supra*, as to the unconstitutionality of State Penal Statutes which are vague and uncertain applies equally to statutes which are vague and uncertain as a result of the construction thereof by the State court and such argument is made a part hereof for the sake of brevity.

There are other resulting absurdities from the construction placed upon the statutes here involved by the Superior Court, but petitioner respectfully submits that the instances herein cited indicate that, as construed, the statutes are void because of uncertainty and resulting absurd consequences and conviction of a penal offense thereunder denies petitioner due process of law.

National Cotton Oil Co. v. *Texas, supra;*
International Harvester Co. v. *Kentucky,* 234 U. S. 216.

Conclusion.

Petitioner, in conclusion, urges upon this Honorable Court that the decision of the Appellate Department of the Superior Court is contrary to the decisions of this Honorable Court and that an important Federal question of substance has been decided by said court in such a way as to deprive petitioner of his liberty without due process of law, and it is, therefore, submitted that this case is one calling for a review of that decision in order that the rights, guaranteed to petitioner by the United States Constitution, may be preserved and, to the end that the judgment of the Appel-

late Department of the Superior Court of the State of California as to Count 1 may be reversed and that justice may be done to petitioner, a writ of certiorari should be granted.

Respectfully submitted,

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